No. 84-654

In the Supreme Court

OF THE

United States

OCTOBER TERM 1984

CHEVRON CORPORATION, ET AL.,
Petitioners,

VS.

ARIZONA, CALIFORNIA, FLORIDA, ET AL.,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RICHARD W. ODGERS
Counsel of Record
RICHARD J. MACLAURY
PAUL R. GRIFFIN
W. JEFFREY SCHMIDT
225 Bush Street
Mailing Address P.O. Box 7880
San Francisco, CA 94120
Telephone: (415) 983-1116
Counsel for Petitioner
Chevron Corporation

PILLSBURY, MADISON & SUTRO
225 Bush Street
Mailing Address P.O. Box 7880
San Francisco, CA 94120

Of Counsel
[Counsel for other petitioners are listed on the signature page]

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes and Rules

Other Authorities

No. 84-654

In the Supreme Court

OF THE

United States

OCTOBER TERM 1984

CHEVRON CORPORATION, ET AL.,
Petitioners,

VS.

ARIZONA, CALIFORNIA, FLORIDA, ET AL.,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners submit this reply brief to address certain arguments raised in the opposition briefs filed by respondents ("States' Br.") and by amicus curiae, the City of Long Beach ("City's Br.").[1]

REASONS FOR GRANTING CERTIORARI

Although acknowledging that petitioners "have made a forceful case for securing the jury right to individuals" (States' Br., p. 20), respondents contend that the language of the Seventh Amendment and the surrounding history do not prove that the Amendment was limited to private parties (States' Br., p. 8). However, respondents are unable to

[1]A list of petitioners' subsidiaries (except wholly owned subsidiaries) and affiliates is contained in Appendix C (p. A-27) to the petition for certiorari.

cite even a single historical reference showing that the Framers intended to extend the right to jury trial to government entities.

Respondents rely primarily on the "historical test" which they assert has been well settled for over 200 years (States' Br. p. 1). But the historical test is not in issue here. The question here is whether a government entity has the constitutional right of jury trial. This Court has never resolved that question.[2]

In another case where this Court was called upon to address a new issue squarely for the first time, the Court stated:

> "The fact that powers long have been unexercised well may call for close scrutiny as to whether they exist; but if granted, they are not lost by being allowed to lie dormant, *any more than nonexistent powers can be prescripted by an unchallenged exercise*" (*United States* v. *Morton Salt Co.* (1950) 338 U.S. 632, 647) (emphasis added).

Further, it is settled that

> "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents" (*Webster* v. *Fall* (1925) 266 U.S. 507, 511).

---

[2]Respondents cite several tax and confiscation cases for the proposition that in actions at law where the United States is a party "issues of fact, on demand of either party, must be tried by jury" (States' Br. p. 15). However, in none of those cases did the Court address the question presented here.

Although the question presented here has not been resolved by this Court, a contention similar to petitioners' was made by the United States in *Atlas Roofing Co.* v. *Occupational Safety and Health Review Commission* (1977) 430 U.S. 442. The issue there was whether the Seventh Amendment precluded Congress from assigning to an administrative agency the task of adjudicating alleged violations of the Occupational Safety and Health Act of 1970. The Solicitor General argued that the Framers did not intend the Seventh Amendment to apply to either party in government litigation:

> "[T]he character of the parties itself puts the matter beyond the reach of the [Seventh Amendment] * * *. [T]he Seventh Amendment is concerned only with *private* litigation * * *. [T]he Seventh Amendment was never intended to control government litigation of *any* kind in *any forum*" (Respondents' Br. in *Atlas*, pp. 17-18).

That conclusion, according to the Solicitor General, is plainly revealed in the history surrounding the adoption of the Seventh Amendment (id., p. 17).[3]

Respondents assert that *United States* v. *Griffin* (W.D. Va. 1926) 14 F.2d 326 should be disregarded because it was an eminent domain case in which there is now no constitutional right to jury trial (States' Br., pp. 15-16). However, at the time *Griffin* was decided, landowners in the Fourth Circuit had a constitutional right to jury trial in eminent domain cases (*Beatty* v. *United States* (4 Cir. 1913) 203

---

[3]The Court found that it was not necessary to reach this argument in *Atlas* inasmuch as it affirmed the lower court on a narrower ground (430 U.S. at 449, n. 6). Although the Federal government's argument in *Atlas* was broader than the one petitioner advances here, it clearly supports our narrower position.

Fed. 620, error dismissed and certiorari denied (1914) 232 U.S. 463).[4]

The importance of *Griffin,* however, is not its ruling on whether a jury attaches in eminent domain cases, but the Court's recognition that the Seventh Amendment was not intended to protect the government:

> "The simplest and best reason for saying that the Seventh Amendment does not preserve a right in the government to trials by jury is that there was not the slightest need for such intent, and that the obvious purpose was not to preserve such right, but was to preserve the right of the people as against the government" (14 F.2d 326, 327).

Respondents cite *Dimick* v. *Schiedt* (1935) 293 U.S. 474, 486 for the obvious proposition that "any seeming curtailment of the right to jury trial should be scrutinized with the utmost care" (States' Br., p. 19; see also City's Br., p. 2). But the jury trial right "scrutinized" in that case was the right of private parties, not government entities. Indeed the Court expressly recognized in *Dimick* that the right to jury trial is sacred to the citizen:

> "The right of trial by jury is * * * 'the most transcendent privilege which any *subject* can enjoy'" (id., p. 485) (citing 3 Blackstone, p. 379) (emphasis added).

State of California v. *United States* (9 Cir. 1968) 395 F.2d 261 does not support respondents' assertion that public property is protected by the "just compensation" clause of the Fifth Amendment (States' Br., p. 6). As this Court has recognized, the principle of "natural equity"—not the Fifth Amendment—requires the Federal government to

---

[4]*Beatty* was subsequently overruled in *United States* v. *Reynolds* (1970) 397 U.S. 14 (see 5 Moore, Federal Practice ¶ 38.32(1), pp. 255-258).

compensate public condemnees when it exercises its power of eminent domain (see, e.g., *Monongahela Navigation Co.* v. *United States* (1893) 148 U.S. 312, 324-325; *United States* v. *Carmack* (1946) 329 U.S. 230, 241-242). In attributing the Federal government's "just compensation" obligation to the Fifth Amendment in *State of California,* the Ninth Circuit misread this Court's decisions and, without engaging in any analysis of the Bill of Rights, mistakenly assumed that the Fifth Amendment protects states in condemnation proceedings. But as the Supreme Court made clear in *South Carolina* v. *Katzenbach* (1966) 383 U.S. 301, 323, the Fifth Amendment was never intended to extend to government entities.

Finally, respondents contend that petitioners' reading of the Seventh Amendment would subject the right of jury trial to "potential uncertainty and discriminatory application" (States' Br., p. 19). But petitioners' test is straightforward and easily applied: the Seventh Amendment was intended to secure a right only to private parties; it was not intended to provide any government entity a right to jury trial under any circumstances.

CONCLUSION

For the foregoing reasons and for those stated in our opening brief, the petition for certiorari should be granted.

Dated: December 6, 1984.

Respectfully submitted,

RICHARD W. ODGERS
Counsel of Record
RICHARD J. MACLAURY
PAUL R. GRIFFIN
W. JEFFREY SCHMIDT
Counsel for Petitioner
Chevron Corporation

PILLSBURY, MADISON & SUTRO
Of Counsel

OTIS PRATT PEARSALL
PHILIP H. CURTIS
HUGHES HUBBARD & REED
One Wall Street
New York, NY 10005
(212) 709-7000
DONALD A. BRIGHT
HOWARD S. FREDMAN
ATLANTIC RICHFIELD COMPANY
515 So. Flower Street
Los Angeles, CA 90071
(213) 486-1554

JOHN A. DONOVAN
RONALD C. REDCAY
HUGHES HUBBARD & REED
555 South Flower Street,
37th Fl.
Los Angeles, CA 90071
(213) 489-5140
Counsel for Petitioner
Atlantic Richfield Company

ROBERT L. NORRIS
EXXON CORPORATION
P.O. Box 2180
1885 Exxon Building
Houston, TX 77001
(713) 656-2223

PHILIP K. VERLEGER
DAVID A. DESTINO
MCCUTCHEN, BLACK,
VERLEGER & SHEA
600 Wilshire Boulevard
Los Angeles, CA 90017
(213) 624-2400

A. P. LINDEMANN, JR.
EXXON CORPORATION
1251 Avenue of the Americas
New York, NY 10020
(212) 333-6438
Counsel for Petitioner
Exxon Corporation

HARRY P. DAVIS, JR.
RANDALL S. HENDERSON
JOAN B. OXFORD
BARTON D. WHITMAN
GULF OIL CORPORATION
P.O. Box 3725
Room 2000
Gulf Tower
1301 McKinney Street
Houston, TX 77253
(713) 754-9868
Counsel for Petitioner
Gulf Corporation

ANDREW J. KILCARR
MAUREEN O'BRYON
DONOVAN LEISURE NEWTON
& IRVINE
1850 K Street, N.W., Suite 1200
Washington, D.C. 20006
(202) 862-4700

CHARLES F. RICE
DONALD L. CLARKE
MOBIL OIL CORPORATION
150 East 42nd Street
New York, NY 10017
(212) 883-4387

THOMAS R. TROWBRIDGE III
DONOVAN LEISURE NEWTON
& IRVINE
30 Rockefeller Plaza
New York, NY 10112
(212) 307-4100

DON T. HIBNER, JR.
CHARLES W. MCCOY, JR.
SHEPPARD, MULLIN,
RICHTER & HAMPTON
333 S. Hope Street
Los Angeles, CA 90071
(213) 620-1780

VINCENT TRICARICO
DONOVAN, LEISURE,
NEWTON & IRVINE
333 South Grand Avenue
Los Angeles, CA 90071
Counsel for Petitioner
Mobil Oil Corporation

WILLIAM SIMON
WILLIAM R. O'BRIEN
ROBERT M. BRUSKIN
HOWREY & SIMON
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 783-0800

ROBERT J. DECKER
WILLIAM G. WINTERS, JR.
SHELL OIL COMPANY
48th Floor
One Shell Plaza
P.O. Box 2463
Houston, TX 77001
(713) 241-6161
Counsel for Petitioner
Shell Oil Company

ROBERT D. WILSON
SHARON S. JACOBS
TEXACO INC.
2000 Westchester Avenue
White Plains, NY 10650
(914) 253-4000

LESLIE C. RANDALL
MAURYNE S. FENNELL
TEXACO INC.
3350 Wilshire Boulevard
Suite 1100
Los Angeles, CA 90010
(213) 739-7200

MILTON J. SCHUBIN
BARRY WILLNER
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, NY 10022
(212) 407-8421
Attorneys for Petitioner
Texaco Inc.

JOHN E. SPARKS
BROBECK, PHLEGER & HARRISON
2900 Spear Street Tower
One Market Plaza
San Francisco, CA 94105
(415) 442-0900

EDWARD A. MCFADDEN
ASSISTANT GENERAL COUNSEL
UNION OIL COMPANY
OF CALIFORNIA
Union Oil Center
461 S. Boylston Street
P.O. Box 7600
Los Angeles, CA 90051
(213) 977-6006

ROBERT G. POTT
UNION OIL COMPANY
OF CALIFORNIA
225 South Lake Avenue,
Suite 571
Pasadena, CA 91101
(213) 977-7885

HAROLD E. ZAHNER
UNION OIL COMPANY
OF CALIFORNIA
Union Oil Center
461 S. Boylston Street
P.O. Box 7600
Los Angeles, CA 90051
(213) 977-6125
Counsel for Petitioner
Union Oil Company
of California